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No. 98-364

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AMERICAN DENTAL ASSOCIATION,
Cross-Petitioner,

v.

CAROLE KOLSTAD,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Cross-Respondent Carole Kolstad opposes the Conditional Cross-Petition for a Writ of Certiorari for the reasons set forth herein.

STATEMENT OF THE CASE

Whether there is a split among the Courts of Appeals concerning the application of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), in "pretext only" cases is beside the point, inasmuch as not one judge on the District of Columbia Circuit viewed the record evidence in this case in this manner. The panel found that there was ample evidence of disparate treatment of Kolstad—in addition to evidence of pretext—to support the jury's finding of intentional gender

discrimination. That determination was *not* the subject of the *en banc* proceedings and represents the D.C. Circuit's decision on this issue, as Cross-Petitioner acknowledges. (Cond. Cross-Pet. at 16 & n.8) ("[T]he issue presented . . . [is] governed by the panel decision."). Cross-Petitioner American Dental Association ("ADA") carefully crops from its quotations the evidence recited in the panel opinion which led the court below to uphold *unanimously* the jury's finding of intentional discrimination and to remand Kolstad's claims for equitable relief and attorneys' fees to the district court for reconsideration in accordance with the requirements of the Seventh Amendment. (Pet. App. 55a).

The ADA unsuccessfully sought rehearing on the very ground set forth in the Conditional Cross-Petition. Although a majority of judges of the Court of Appeals voted to rehear the issue of punitive damages, not one judge voted to rehear the case on the grounds that this was a "pretext-only" case or because the panel's decision was inconsistent with this Court's decision in *Hicks* or in conflict with the decisions of other Circuits, as the ADA had argued.[1] Notably, Circuit Judge Williams, who dissented from the denial of rehearing in the case of *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995),[2] for this very reason, *see* 48 F.3d 1281, expressly joined the

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[1] Argument "B" in the ADA's Suggestion For Rehearing *In Banc*, filed on April 18, 1997 in the D.C. Circuit, states as follows:

B. The Panel's Decision on Liability Conflicts With *St. Mary's Honor Center v. Hicks* and With the Decisions of Other Courts of Appeals.

The court below agreed to rehear only the issue of punitive damages. (App. 75a-76a).

[2] This Court granted certiorari in *Barbour* limited solely to the issue of punitive damages, 116 S. Ct. 805, but dismissed the case as moot after a settlement was reached. 116 S.Ct. 1037 (1996).

panel opinion in this case, except for its holding concerning punitive damages. (Pet. App. 57a, 68a) ("I concur in much of the decision, but not in the...standard of evidence for [awards of] punitive damages . . . . I do not dissent from the view that the jury verdict was binding as to liability. . . .").[3]

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Regardless of the asserted conflict among the circuits applying *Hicks*, this is not a case in which the employer's asserted reason for denying the promotion—that Kolstad showed to be false —was the only evidence that was before the jury. The "question" assertedly "presented" by the Conditional Cross-Petition (Cond. Cross-Pet. at i), simply does not exist in this case. The record, as described by the court below, reflects that there was substantial evidence of disparate treatment of Kolstad by the ADA and its decisionmakers—in addition to proof that the ADA's proffered reason for its decision was unworthy of belief.

Secondly, the ADA never preserved this issue for post-verdict and appellate review, in any event. In moving for a directed verdict at the close of all the evidence, the ADA neither cited nor relied upon *Hicks* and made no claim or

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[3] Similarly, Circuit Judge Henderson, who dissented from another panel's application of *Hicks—Aka v. Washington Hospital Center*, 116 F.3d 876, 897, 898-902 (D.C. Cir. 1997)—endorsed the panel opinion in *Kolstad*, finding that the panel "had adequately explain[ed] why a reasonable factfinder could infer discrimination on the basis of the prima facie case and pretext...." *Id.* at 900. The D.C. Circuit, while declining to rehear *this* case on the grounds that the panel had misapplied *Hicks*, agreed subsequently to rehear *Aka en banc* on this very issue, 124 F.3d, 302, as the court below observed (Pet. App. 20a-21a) and, as the ADA concedes. (Cond. Cross-Pet. at 16 & n. 8).

argument that this was a "pretext only" case which did not warrant submission to the jury.

1. THIS CASE DOES NOT PRESENT THE QUESTION CONCERNING THE PROPER INTERPRETATION OF *ST. MARY'S HONOR CENTER v. HICKS*, WHICH HAS DIVIDED THE COURTS OF APPEALS

The ADA agreed to try the issue of liability to the jury and the jury responded with a finding that the ADA had intentionally discriminated against Kolstad because of her sex. When the ADA moved for judgment as a matter of law after the verdict, the district court, while ignoring the ADA's failure to preserve the issue (*see* pp. 7-10, *infra*), nevertheless refused to set aside the verdict. (Pet. App. 69a-74a).

Viewing the evidence in the light most favorable to the prevailing party (which the district court had failed to do), the court below unanimously recognized that Kolstad had offered several types of evidence to support the jury's verdict, in addition to showing that the ADA's proffered reasons for her rejection were unworthy of belief. Thus, the court below found that Kolstad showed that the discrimination at issue was not the isolated spontaneous act of a lower level supervisor, but the result of a three month scheme involving the ADA's national Executive Director and other high-level executives. As part of that scheme, the ADA's officials (a) repeatedly met with the successful male candidate about the promotion, while

refusing to meet with Kolstad,[4] (b) accorded only the male candidate a formal interview by the ADA's Executive Director,[5] and (c) made a last minute change in the job description of the position at issue so that it would conform to the male candidate's background.[6] Second, Kolstad produced evidence showing that the explanation which the ADA offered at trial for selecting the male candidate was entirely different from the explanation which it had given at the time of the

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[4] "Before ADA posted the opening, [the male candidate] Spangler frequently met with the incumbent (Jack O'Donnell), ADA did not post the position promptly after O'Donnell decided to retire, and a secretary familiar with the process testified that she thought Spangler was being groomed for the job. Leonard Wheat, head of ADA's Washington office and the person most closely supervising the competing candidates, refused to meet with Kolstad to discuss O'Donnell's position, despite frequently meeting with Spangler." (Pet. App. 38a).

[5] "Although Executive Director Dr. William Allen formally appointed O'Donnell's successor, Allen—based in ADA's Chicago headquarters—relied heavily upon Wheat's recommendation of Spangler. Assigning all legislative work to Spangler, Wheat repeatedly refused Kolstad's requests to work on legislative matters, despite their relevance to the regulatory issues when covered and her experience in the field. Formally interviewing Spangler but not Kolstad, Allen failed to review Kolstad's numerous, detailed, positive performance evaluations." (Pet. App. 38a).

[6] "[A] few days before posting the job, [the ADA's Executive Director] edited the description to fit [the male's] qualifications. [The incumbent's] position description originally stated that its 'most important responsibility' was to '[m]aintain liaison with federal agencies, bureaus and Administration,' corresponding directly to Kolstad's work at ADA. Tailoring the job description to [the male's] specialty, [the selecting official] added . . . whole phrases from the position description questionnaire used to hire [the male]." (Pet. App. 38a-39a).

selection.[7] Third, Kolstad's evidence showed that the ADA had altered documents to justify its selection of the male candidate.[8] (Pet. App. 39a). Fourth, Kolstad offered evidence that the director of the ADA's Washington office, whose recommendation of the male candidate was accepted by the national headquarters, had repeatedly told sexually offensive jokes at staff meetings and had referred to several prominent professional women in gender-specific derogatory terms.[9] Lastly, Kolstad offered evidence that the reasons given to her by the ADA for denying the promotion were false and pretextual.[10]

The ADA has pointed to no asserted misstatement of the law by the court below on this point. Its quarrel is not with any legal principle articulated by the District of Columbia

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[7] "After telling [Kolstad] that she was passed over because she lacked experience with health care reform and was too valuable in her position, ADA abandoned that justification at trial, instead attacking Kolstad's general qualifications and writing ability." (Pet. App. 39a).

[8] "[T]he jury could have concluded that ADA attempted to cover up [the male's] preselection" by "edit[ing]" the position description, by "[t]ailoring" it to fit the male's "specialty" and that ADA had "altered documents to justify his promotion." (Pet. App. 38a-39a). Based on the trial record, the jury could have found that "Kolstad was the more qualified of the two candidates," that the less experienced "male candidate" "technically failed to meet the minimum posted requirements for the position." (Pet. App. 37a-38a).

[9] "Kolstad's supervisor whose advice [the selecting official] relied on in deciding to promote [the male employee] instead of Kolstad, told sexually offensive jokes at the office and referred to professional women as 'bitches' and 'battleaxes.'" (Pet. App. 40a).

[10] "[T]he jury could also have reasonably found that ADA's claimed nondiscriminatory reasons for choosing Spangler over Kolstad—that Kolstad lacked recent legislative experience and strong writing skills—were after-the-fact rationalizations unworthy of belief." (Pet. App. 48a).

Circuit, but rather, with the court's findings concerning the existence of record evidence to support the jury's verdict and its application of this Court's decisions to those facts. Rule 10 of this Court emphasizes that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R.10. The ADA has not attempted to demonstrate and has totally failed to show why this is a "rare[ ]" case warranting departure by the Court from the strictures contained in its Rules governing exercise of its certiorari jurisdiction.[11]

2. THE ADA FAILED TO PRESERVE ANY *HICKS* ISSUE FOR APPELLATE REVIEW

Although the ADA expressly relied upon *Hicks* in its post-verdict motion for judgment as a matter of law ("JMOL"), that motion was fatally flawed because the ADA had failed to "specify" that it was relying upon *Hicks* (or the principles of *Hicks*) in the motion that it made at the close of the evidence as required by Rule 50, Fed.R.Civ.P. Rule 50(a)(2) of the Rules of Civil Procedure requires a party moving for judgment as a matter of law to specify the law and facts on which it relies:

> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. ***Such a motion shall specify*** the judgment sought and ***the law and the facts on which the moving party is entitled to the judgment***.

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[11] In its cross-petition, the ADA has neither shown nor attempted to show that, under the decisions of any other Court of Appeals, Kolstad's evidence would have been insufficient to establish liability. As Kolstad has shown in her Petition, the evidence she offered would have been sufficient to sustain a verdict for punitive damages in every Circuit which has established standards for punitive awards under Title VII, except the D.C. Circuit. (Pet. at 10-12, 13).

(Emphasis added). Rule 50(b) provides that if "the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence," the "movant may ***renew its request*** for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment. . . ." (Emphasis added).

The district court record plainly shows that the ADA's post-verdict motion was not a "renew[al]" of the grounds specified in its pre-verdict motion. The ADA filed no papers in support of its pre-verdict motion, and the trial transcript makes clear that no mention whatsoever was made by ADA counsel of *Hicks* or the ADA's argument that Kolstad's evidence established "only" that the employer's proffered reasons for her rejection were false and, thus, was insufficient as a matter of law to support a finding of liability. The *complete* colloquy between the Court and counsel for the ADA at the close of the evidence was as follows:

THE COURT:	Now, Do you wish to make your motion?
MR. HARRISON:	Yes your Honor. I would move for judgment as a matter of law at this time.
THE COURT:	All right. The motion is denied.

(Oct.25, 1995 Tr. at 121, reprinted in the Appellate Appendix at J.A. 1109).

In the district court and in the Court of Appeals, Kolstad relied upon the decision of *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), for the proposition that the ADA had failed to preserve the *Hicks* issue for review. In *Whelan*, the D.C. Circuit quoted the Advisory Committee's Notes pertaining to

the 1991 amendments to Rule 50 and observed that a party cannot raise in a post-verdict JMOL arguments which had not been specified in a pre-verdict motion:

> Rule 50(a)(2) . . . requires the motion to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Rule 50(b) states that when the judge either denies or does not initially grant such a motion, the case is deemed submitted to the jury subject to the judge's later determination of the legal issues raised in the motion. The motion "may be renewed" later under Rule 50(b). We have understood this to mean, and ***it seems indisputable, that '[t]he precise claim made in the motion for judgment n.o.v. must have been made in the motion for directed verdict.'*** *U.S. Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 539, 548 (D.C. Cir. 1982); accord Fed.R.Civ.P. 50 advisory committee's note to 1991 Amendment (remarking that new language explicitly requiring specificity in Rule 50 motions works to "alter[ ] the result" in cases where a court, by allowing less specificity, effectively circumvented the requirement that the later motion be based on grounds raised in the earlier motion).

Id. at 1251.[12] The other courts of appeals have construed Rule 50 similarly. *See O'Connor v. Huard*, 117 F.3d 12, 17 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 691 (1998); *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154-1155 (2d Cir. 1994); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990). Thus, even if this case did present the "pretext only" issue (which it plainly does not), the ADA failed to preserve that issue for appellate review.

CONCLUSION

For all the foregoing reasons, the Court should deny the Conditional Cross-Petition for a Writ of Certiorari.

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[12] In *Whelan*, this defect was waived by the appellee. That did not occur here, as reflected by the record in the District Court and in the Court of Appeals:

Citing *Whelan*, Kolstad objected to the ADA's post-verdict motion in the district court. (Plaintiff's Opposition to the Motion for Judgment as a Matter of Law at 2 & n. 1, reprinted in the Appellate Appendix at J.A. 90). And, at oral argument, Kolstad's counsel expressly disavowed any waiver: "I don't think . . . they [the ADA] preserved their position . . . I don't need to get to the technicalities, although I am surely not waiving them . . . ***None of the grounds you see now were recited before the Court at the close of the evidence***. I make that point." (January 5, 1996 Transcript of Oral Argument at 16-17, reprinted in the Appellate Appendix at J.A. 128-29)(Emphasis added).

Kolstad also preserved her objection in the Court of Appeals, arguing in her Brief that the ADA was foreclosed from making a *Hicks* argument because of the requirements of Rule 50. (Kolstad's Brief in Nos. 96-7030/7047 dated Oct. 11, 1996 at 14-17).

Respectfully submitted,

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